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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 533

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.,
Petitioners

v.

UNITED AIRCRAFT CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

International Association of Machinists, AFL-CIO, and District Lodge No. 91, Lodge 1746 and Lodge 743, International Association of Machinists, AFL-CIO, appellants below, petition for a writ of certiorari to review a decision of the United States Court of Appeals for the Second Circuit affirming the District Court's denial of an application for injunction.

OPINIONS BELOW

The opinion of the court below (R. 168-177, App. A, 1a-7a *infra*), 56 LRRM 2629, is not yet officially reported. The opinion of the district court (R. 119-123, App. B, 8a-11a, *infra*), 56 LRRM 2389, is not officially reported.

JURISDICTION

The opinion of the Court of Appeals was handed down on June 23, 1964 (R. 176). A petition for rehearing (R. 178-180) was denied on July 15, 1964 (R. 181-183). This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether federal courts are required by injunction to enforce the constitutional duty of state courts under *Marine Engineers* v. *Interlake Co.*, 370 U.S. 173, 182 (1962), to relinquish jurisdiction of a state court damage suit which the General Counsel of the National Labor Relations Board alleges is an unfair labor practice because it was filed to coerce withdrawal of NLRB charges?

2. Whether federal courts may properly deny private litigants relief against state court litigation designed to discourage recourse to federal tribunals for vindication of federal rights?

3. Whether *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U.S. 511 (1955), has been undermined and should be reconsidered?

STATUTES INVOLVED

Relevant statutory provisions are set out in Appendix G, *infra*, pp. 28a-29a.

STATEMENT

A. THE RETALIATORY THREATS AND SUITS

1. The Strike and Settlement Agreement

On June 8, 1960, petitioner locals, representing bargaining units with over 23,000 employees in and around Hartford, Connecticut, went on strike (R. 169).[1] Within a few days, respondent filed suit in a state court and charges with the National Labor Relations Board seeking injunctive relief against alleged mass picketing, force and violence (R. 64-65, J.A. 45-46, 56-57). On June 13, 1960, and June 16, 1960, the unions stipulated in the state and federal proceedings respectively to limit the number of pickets and refrain from tortious misconduct (*ibid.*). Although the strike and picketing continued until August 11, 1960, no charge of violation of the stipulation was filed in and no addi-

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[1] In this Statement, the designation "App." refers to the Appendix to this petition and "R" refers to the Record certified to this Court. The designation "J.A." refers to the Joint Appendix for petitioner and the Board in No. 28,595 in the court below, an appeal by respondent from the District Court's refusal to order petitioners to withdraw NLRB charges relating to respondent's refusal to reinstate fifty (50) strikers accused of misconduct. Number 28,595 was heard on the same day as the instant case by the same panel of the court below, and is pending *sub judice*. Portions of the Joint Appendix, which has been certified by the Clerk as part of the record herein, were incorporated by reference into the appendix to petitioners' brief in this case (R. 1). The designation "Br." refers to the Brief in No. 28,595, which brought to the judicial notice of the court below material contained in respondent's depositions, answers to interrogatories, admissions and pleadings on file in the district court in petitioners' Section 301 actions and the Board's subpoena enforcement action against respondent. *NLRB* v. *United Aircraft Corp., Pratt & Whitney Air. Div.*, 200 F. Supp. 48 (D. Conn. 1961), aff'd, 300 F.2d 442 (2d Cir. 1962). A certified copy of this Brief has been lodged with the Clerk.

tional relief asked from either the state or the federal court (R. 64-65).

From time to time respondent threatened to sue for one million dollars damages unless the unions terminated the strike (R. 67). The only claim specified, however, was property damage in the amount of $68,000 (R. 68). Petitioners offered to pay this amount but their offer was ignored (*ibid*).

After nine weeks the strike was called off in exchange for, *inter alia*, respondent's promise to reinstate strikers to their former jobs "if available" and to place those for whom jobs were not available on a "preferred hiring list." *Local 743, IAM* v. *United Aircraft Corp.*, 53 LRRM 2904, 2906 (D. Conn. 1963).

2. Respondent Attempts to Block Discovery and Bar Litigation of Reinstatement Rights

When it appeared that over three thousand strikers had not been reinstated, petitioners asked respondent to furnish the names of employees "whose jobs were filled by replacement," a current seniority list with dates of hire of new employees, and a copy of the preferred hiring list respondent was required to maintain. When respondent refused, petitioners announced that they would file unfair labor practice charges. Respondent replied, "we're going to sue you" (R. 69).

On and after November 21, 1960, petitioners filed charges alleging that respondent had violated its duty to bargain collectively in good faith and to reinstate strikers. Respondent assured the Board's Regional Director: "the truth very simply is that if the Company failed, on August 13 (at the end of the strike) to reinstate a striker to his old job, it was necessarily because

the job was filled by a replacement or because his old job had been eliminated", but it resisted his efforts to look behind that conclusion on the theory that the Board is not allowed to "perform the Union's job of policing" compliance with a strike settlement agreement (R. 4-5).

On December 11, 1961, petitioner locals filed breach of contract suits under Section 301 in the United States District Court. (App. 2a). In January, 1962, respondent threatened to sue for damages if petitioners persisted in litigating their charges and Section 301 actions (R. 69-71).

Subsequently, in reply to interrogatories, respondent revealed that during the strike it "made no conscious or recognizable effort 'to fill jobs held by strikers' "; that "we did not hire replacements as such" and that new employees "were not hired specifically to replace strikers but merely to perform whatever jobs * * * needed workers to perform work." Respondent admitted that "when the strike ended, all persons who were working on any jobs were retained on those jobs regardless of any consideration of whether their seniority was greater or lesser than the seniority of such registered strikers" and that it had accorded preference to all who had been willing to work during the strike because it "did not believe that it would be fair or equitable to discharge, demote, or transfer [them] * * * simply to make jobs available to employees who had participated in the strike." (Br. 6-7).

In January, 1963, respondent threatened to sue for fifteen million dollars if petitioners persisted in pressing their suits and NLRB charges (R. 71-72).

3. The General Counsel Issues a Complaint—Respondent Sues Petitioners In Retaliation

On February 7, 1963, the General Counsel of the National Labor Relations Board issued a complaint on petitioners' charges (J.A. 2-19) and thereafter scheduled hearing for May 14, 1963 (R. 72). On or about May 13, 1963, respondent filed suits against petitioners in the Connecticut state court for compensatory damages of fifteen million dollars and punitive damages in addition (R. 157-158; J.A. 42-49, 53-61). The complaints allege that the damages resulted from "acts occurring between June 8 and August 11, 1960 (the entire strike period) [which] constituted an unlawful interference with [respondent's] business" (R. 72), and from a "conspiracy" (J.A. 35, 38).[1]

Total losses from the entire strike were appraised by respondent itself at fifteen million dollars (R. 73-75, 90, 95-96). Moreover, respondent's principal customer, the Government of the United States, had borne seventy-five (75%) percent of these losses (*ibid.*).

In answer to the NLRB complaint, respondent alleged that "the strike was so tainted by and involved with * * * violence, mass picketing, threats, restraints and coercion [that it] * * * constituted concerted activity not only not protected by the Act but affirmatively prohibited thereby." (R. 74, J.A. 29). The Board ordered this allegation stricken from respondent's answer (R. 74, J.A. 61-62).

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[1] The losses are alleged to consist of (1) sums spent "in increased costs of production"; (2) loss of anticipated profits; (3) failure to meet "contractual and other obligations"; (4) expenses incurred "for damage to property of its employees and others" and (5) sums spent "to protect its lawful interest." (J.A. 46, 58).

B. PROCEEDINGS BEFORE THE BOARD AND THE STATE COURT

In June, 1963, petitioners filed pleas in abatement in the state court (R. 9-12) and unfair labor practice charges with the Board (J.A. 38-41, 50-53), alleging that respondent's formally legitimate damage suits were actually reprisals against petitioners' recourse to the Board and the federal courts, deriving intimidatory and coercive thrust from the attempt to hold petitioners liable under state law for consequences of federally protected strike action on federally forbidden "totality of effort" and "conspiracy" theories (R. 3, 74-75, J.A. 46, 58).

On August 30, 1963, the General Counsel of the National Labor Relations Board issued a complaint on petitioners' charges, alleging that the threats and damage suits violated Section 8(a)(1). (R. 3, 7-8, J.A. 30-61, 63). The General Counsel explained (App. C, 12a-13a; R. 7-8):

> "In *Clyde Taylor Co.*, 127 NLRB 103, the Board, while holding that an employer did not violate the Act by obtaining a state court injunction banning peaceful picketing in protest against unlawful discharges, held that the employer's threat to sue for libel for filing charges with the Board did not constitute an exercise of the 'normal right of all persons to resort to the civil courts to obtain an adjudication of their claims,' and that such a threat violated Section 8(a)(1). If such a threat is violative of the Act, it follows that the effectuation of the threat by filing the civil action also constitutes unlawful restraint.
>
> "It was concluded that the civil action instituted by the Company here was directly related to and in effectuation of the Company's illegal threat to commence civil proceedings if the charging party did not withdraw the unfair labor practice charge

filed against the Company; and that bringing the action, like the threat to do so, constituted a violation of Section 8(a)(1)."

On October 18, 1963, respondent filed "motions to erase" petitioners' pleas in abatement, contending that since Connecticut was powerless to determine whether the damage suits actually were unfair labor practices, it lacked jurisdiction to entertain the pleas (R. 13-16). On November 12, 1963, Judge Barber overruled the motions to erase holding (App. D, 15a; R. 18, 20):

> "An issue of law or fact should be joined on the plea in abatement in order that the court may deliberately upon proper pleading determine whether under the federal pre-emptive doctrine the claim of unfair labor practice is 'reasonably arguable' and applicable in this case. See *Marine Engineers* v. *Interlake Co.*, 370 U.S. 173, 182; 82 S. Ct. 1232, 1242; *Lavery's Main St. Grill Inc.* v. *Hotel Employees Union*, 146 Conn. 93, 100 & 103."

On November 20, 1963, respondent filed demurrers alleging that its damage suits could not constitute an unfair labor practice, but that, even if they did, the state court would not be deprived of jurisdiction (R. 21-26). On January 8, 1964, the state court (Pastore, J.), sustained the demurrers (App. E, 16a-20a; R. 27-37). Invoking rules of state practice, it refused to take judicial notice of the General Counsel's complaint (App. E, 18a-19a; R. 29-30). Contrary to the General Counsel, it construed *Clyde Taylor* to mean that if appellee believed in "good faith" that it had a legal right to file the damage suits, it could not commit an unfair labor practice by threatening and filing them (App. E, 17a-18a; R. 28-29). It also held that even if activities protected by Section 7 were a target of the

suits, the state would not lack jurisdiction to proceed. It said (App. E, 19a; R. 30-31):

> "to concede the pre-emptive jurisdictional proposition of defendants, either because of the mere filing of plaintiff's complaint for damages, or because of the filing by defendants with the N.L.R. Board of charges against plaintiffs of committing an unfair labor practice in bringing the action, could lead to strange and unjust results. It would be tantamount to allowing defendants, permanently or temporarily for an uncertain length of time, even beyond the limitations period perhaps, as has been stated, an immunity from liability for their tortious action gained at the expense of cutting off, or unduly delaying an injured party from his right to recover damages for his property, without recourse or compensation, to an extent which the United States Supreme Court has so far refused to decree, and which no declaration of congressional policy yet supports."

Thereafter, in an attempt to satisfy Connecticut practice, petitioners filed an amended plea in abatement, specifically alleging and incorporating the General Counsel's complaint (App. F, 22a-26a; R. 38-41). On February 21, 1964, the state court (House, J.), sustained respondent's demurrer to the amended plea, refusing to acknowledge the General Counsel's complaint on the ground that "[t]his court can hardly be expected to evaluate the effect of" its issuance (App. F. 26a; R. 54) and adopting the "well reasoned opinion by Pastore, J." (App. F. 27a; R. 49, 54-55).

C. PROCEEDINGS BELOW

On March 2, 1964, petitioners filed their complaint in the district court (R. 1a-6), alleging that by refusing to dismiss the damage suits in the face of petitioners' more than adequate showing of conflict and preemp-

tion, the Connecticut court had violated its constitutional duty as enunciated by this Court in *Interlake* and requesting a declaration "that the State of Connecticut has no legal right to entertain [the] suits" and implementing injunctive relief. Jurisdiction was predicated principally on 28 U.S.C.A. § 1337; 28 U.S.C.A. § 1331; 28 U.S.C.A. § 1343, the Commerce and Supremacy Clauses of the Constitution of the United States and 28 U.S.C.A. § 1651.

On March 13, 1964, petitioners filed an amendment alleging that the state courts suits also unlawfully encroach upon petitioners' freedom to sue under Section 301 (R. 61-62).

The district court denied injunctive relief on the ground (App. B, 9a-11a; R. 119-123) that under *International Union* v. *Underwood Corp.*, 219 F.2d. 100 (2d Cir. 1955) and *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U.S. 511 (1955), "the rules of comity" embodied in 28 U.S.C.A. § 2283, prohibit "federal judicial intrusion into the orderly proceedings of the state courts", absent a showing that "the proceedings in the state court would * * * frustrate or impede the expeditious prosecution of" petitioners' Section 301 actions, and "the Board has not attempted to vindicate its authority through the processes of this Court."

On April 27, 1964, respondent moved in the state court for default judgment. Petitioners were advised by the Clerk of the state court that, unless they filed a responsive pleading, that motion would be granted (R. 152-155). Petitioners thereupon applied to the court below for an injunction pending appeal (R. 125-146). That motion was denied, but the court expedited

the appeal itself, waiving printing requirements (R. 166). After argument, the court below affirmed (App. A, 1a-7a; R. 168-176), holding that the district court was without jurisdiction because the right asserted against the state court is not "a 'constitutional right' in the bill of rights sense"; federal courts do not have "exclusive jurisdiction" to vindicate rights arising under the Supremacy Clause; "[n]othing has occurred since *Richman* which casts any doubt on what the Supreme Court there said" and "Section 2283 applies and prevents the issuance of an injunction."

REASONS FOR GRANTING THE WRIT

1. In its 1955 decision in *Richman* a majority of this Court held that "*until*" the "penumbral region * * * between state and federal authority touching industrial relations" is "finally clarified by definitive rulings here" (348 U.S. at 521, emphasis added), a private litigant would be unable to obtain a federal injunction against state court encroachment upon the preempted field. No less than five times in five pages, the opinion keyed disability to the difficulty of determining when state jurisdiction was preempted and when it was not.[3]

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[3] "[T]he inadmissibility of the assumption that ascertainment of pre-emption under the Taft-Hartley Act is self determining or even easy" (348 U.S. at 516); "What is within exclusive federal authority may first have to be determined by this Court to be so" (*ibid.*); "the rather subtle line of demarcation between exclusive federal and allowable state jurisdiction over labor problems" (at 519); "In its effort to define what had been withdrawn from the States and what has been left them, the opinion in *Garner*, decided just last Term, was hedged with qualifications, even in a case which dealt only with state court enforcement of a state labor policy as such" (*ibid.*); the "penumbral region" (at 521).

Clarification began in *Guss*,[4] continued in *Garmon*,[5] and culminated in *Interlake*.[6] It is entirely clear now that if encroachment is "arguable," the state court must relinquish jurisdiction, even though relinquishment leaves the conduct complained of in the state proceeding wholly unregulated.[7] A possibility of conflict between federal and state regulation establishes arguability; state power is superseded until all possibility of conflict is removed.[8] A complaint by the General Counsel of the Board is more than sufficient to establish possibility of conflict.[9]

Interlake explains that the state court may neither decide nor proceed without deciding the "underlying issue upon which its jurisdiction depend[s]." 370 U.S., at 184. In the face of a non-frivolous challenge, the state must "concede" that it lacks jurisdiction, for that is "the only workable" way to assure uniformity. *Ibid.*, at 182. Confronted with an objection

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[4] *Guss* v. *Utah Labor Rel. Board*, 353 U.S. 1 (1957); *Amalgamated Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20 (1957).

[5] *San Diego Unions* v. *Garmon*, 359 U.S. 236 (1959).

[6] *Marine Engineers* v. *Interlake Co.*, 370 U.S. 173, 182, 184-185 (1962); see *Incres Steamship Co.* v. *International Maritime Workers Union*, 372 U.S. 24, 27 (1963) and *Retail Clerks* v. *Schermerhorn*, 373 U.S. 746, 755 (1963).

[7] *Guss* case, *supra*, 353 U.S. 1, 10-11:

> "We are told by appellee that to deny the State jurisdiction here will create a vast no-man's-land, subject to regulation by no agency or court. • • • [But] Congress has expressed its judgment in favor of uniformity. Since Congress' power in the area of commerce among the States is plenary, its judgment must be respected whatever policy objections there may be to creation of a no-man's-land."

[8] *Interlake* case, *supra*, 370 U.S., at 185.

[9] *Ibid.*, 370 U.S. 182, n. 16; 184, n. 21.

it is powerless to decide, it is "the duty of the state court to defer" (*ibid.*, at 184) and "proceed no further." *Abelman* v. *Booth*, 21 How. (62 U.S.) 506, 523 (1859).

State court proceedings which encroach upon the preempted field are no longer, as in *Richman's* day, "allowed to run [their] course" (348 U.S., at 521). *In re Green*[10] holds that state court jurisdiction over a breach of contract action may successfully be challenged at the threshold by contempt; the *Mine Workers* rule[11] does not apply (369 U.S. at 692, n. 1), because, where Congress has preempted the field, "if the federal policy is to prevail, federal power must be complete."

Construction Laborers v. *Curry*, 371 U.S. 542, 549-550 (1963), overruling *Ledbetter* (at 552), holds interlocutory orders reviewable where "postponing review" would compel a litigant to "face further proceedings in the state courts which the state courts have no power to conduct * * * [because that] would seriously erode the national labor policy." Assertion of state court "jurisdiction to deal with a controversy which is beyond its power" is explicitly distinguished from erroneous decision of "a matter of federal law in a case admittedly within its jurisdiction." *Ibid.*, at 548.

Liner v. *Jafco, Inc.*, 375 U.S. 301, 307-309 (1964), again giving "significant weight to the vital importance of preventing [assertion of] state [authority] from frustrating federal labor policy * * *," holds that customary "mootness" policies cannot stand in

[10] 369 U.S. 689 (1962).

[11] *United States* v. *United Mine Workers*, 330 U.S. 258, 293 (1947).

the way of correction "of the state court's adverse decision on the claim of federal preemption."

2. The instant case is a compelling demonstration that relief against state court encroachment cannot await normal appellate review. The General Counsel has charged that the state court suit abridges petitioner's Section 7 rights because it was instituted, not to redress violence, but to compel withdrawal of charges filed with the Board. To entertain that suit while the General Counsel's complaint is pending is not only to sanction and support an officially charged continuing invasion of petitioners' Section 7 right to seek redress from the Board, but also to jeopardize and perhaps altogether defeat the federal mechanism for elimination of unfair labor practices,[12] and to invite an actual collision between the Board and the state court.

The legality of the damage suits being "in the process of litigation through procedures originating in the Board * * * [assertion of state jurisdiction] creates more than theoretical danger of conflict between state and federal regulation of the same controversy." *Interlake* case, 370 U.S. at 185. Even *Richman* denied injunctive power only "*before* complaint has been entertained by the Board." 348 U.S., at 514. (Emphasis added.) It did not purport to hold federal courts powerless to stop an *actual* conflict. It did not sanction the spectacle of a state court proceeding *with* the very same suits the General Counsel is simultaneously pro-

[12] The district court's suggestion that coercive tendency may be disregarded because petitioners were not actually intimidated into withdrawing (App. B, 10a; cf. R. 115-118), is answered by Judge Learned Hand's observation in *Bomar* v. *Keyes*, 162 F. 2d 136, 139 (2d Cir. 1947), cert. denied, 332 U.S. 825 (1947): "it would emasculate the act * * * to deny protection against reprisal to those whom threats did not deter."

ceeding *against*. Cf. *Bethlehem Steel Co.* v. *N.Y.S. L.R.B.*, 330 U.S. 767, 776 (1947).

Power in the Board to condemn and in the state court to approve the same damage suits cannot, on any theory, "be reconciled or consistently stand together." *Sinnot* v. *Davenport*, 22 How. (63 U.S.) 227, 243 (1859). The two proceedings cannot " 'move freely within the orbits of their respective purposes without impinging upon one another.' *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202, 207 (1944)." *Hill* v. *Florida*, 325 U.S. 538, 543 (1945); *Colorado Com'n* v. *Continental*, 372 U.S. 714, 722 (1963); *Rice* v. *Santa Fe Elevator*, 331 U.S. 218, 230 (1947). The classic example of what Congress has forbidden to the states is assertion of power to treat as legal what the federal "forum would enjoin." *International Union* v. *Russell*, 356 U.S. 634, 644 (1958).

It follows that only if the Board were plainly forbidden to condemn the suits as unfair labor practices could the state court properly retain jurisdiction over them. *Incres* case, *supra*, 372 U.S., at 27; *Schermerhorn* case, *supra*, 373 U.S., at 755. Yet, *Richman* itself says that employer resort to a state court may "under appropriate circumstances give ground for a finding of an unfair labor practice." 348 U.S. at 520.

That respondent purported to invoke only the state's recognized interest in preventing or punishing violence and property damage[13] does not foreclose the possibility of an unfair labor practice. "It is not the label

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[13] *United Automobile Workers* v. *Wisconsin Employment Relations' Board*, 351 U.S. 266, 274-275 (1956); *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, 666-669 (1954).

affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction." *Plumbers Union* v. *Borden*, 373 U.S. 690, 693, 698 (1963).

States may not effectuate their interest in preserving the peace by means "which would restrict the exercise of rights guaranteed by the Federal Acts" (*Russell* case, *supra*, 356 U.S. at 644), or impair the national interest in freedom to strike and to litigate in federal tribunals. Cf. *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103-105 (1963). State tort law may not be invoked to alter "rights and duties affirmatively established by Congress" (*Russell* case, *supra*, 356 U.S. at 645); or to mulct for "anything more than the direct consequences of the violent conduct" (*Garmon* case, *supra*, 359 U.S. 236, 248-249, n. 6), or on "totality of effort" (cf. *Local 20, Teamsters* v. *Morton*, 377 U.S. 252, 260-262 (1964)), or "conspiracy" (*Automobile Workers* v. *Wisconsin Employment Relations Board*, 336 U.S. 245, 257-258 (1949)), theories, or as a "retaliatory measure" (*ibid.*, at 256), against resort to the Board and the courts.

The deterrence potential of state court damage suits was recognized in *Garmon*, 359 U.S., at 246-247 and *Barrows* v. *Jackson*, 346 U.S. 249, 254 (1953). Federal law is not helpless against invocation of state law "beyond its legitimate scope." *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U.S. 661, 670 (1944); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176-177 (1942). Rights and remedies "granted by Congress" are not to "be taken away" by the pressure of state court suits (*Donovan* v. *City of Dallas*, 377 U.S. 408, 413-414 (1964)), or "dried up by * * * [state court] intimidation." *John Hancock Mut. Life Ins. Co.* v.

NLRB, 89 U.S. App. D.C. 261, 263, 191 F. 2d 483, 485, 486 (1951); cf. *Local 207, Bridge Workers* v. *Perko*, 373 U.S. 701, 707 (1963). "Certainly, a court can act where a party's conduct is calculated to frustrate litigation." *Bergen Drug Co.* v. *Parke, Davis & Co.*, 307 F. 2d 725, 728 (3d Cir. 1962). To sanction coercive invocation of state law "would thwart the administration of [the National Act] * * * itself * * * [and] be a perversion of the legislative intent." *John Hancock* case, *supra*.

Inasmuch as respondent's suits claim damages for the post-stipulation period (p. 6, *supra*), they seek to recover for at least arguably protected strike action. A state court is no more authorized to entertain a complaint for damages against than a suit to enjoin an arguably protected strike. Cf. *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 482 (1955) and *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131, 138-140 (1957), with *International Union* v. *Russell*, 356 U.S. 634, 638-640 (1958). Thus, the Connecticut court plainly lacked jurisdiction.

3. Adherence to *Richman* after *Interlake* would be an anachronism. *Curry* recognizes that review after the state court has concluded the proceeding it irreparably injures federal policy by conducting comes too late. With due deference to the court below, there is no dearth of authority for district court enforcement of the state court's duty.

Federal question jurisdiction is beyond dispute. Since the duty to abstain is imposed by the National Act as construed by this Court, and consequently by the Supremacy Clause, a claim of violation necessarily "arises under" the Constitution and laws of the United States. The contrary suggestion (App. A, 5a), is in clear conflict with decisions of this Court. *American*

Federation of Labor v. *Watson*, 327 U.S. 582, 591 (1946); *Capital Service* v. *NLRB*, 347 U.S. 501, 504 (1954); *St. John* v. *Wisconsin Employment Relations Board*, 340 U.S. 411 (1951); *Baker* v. *Carr*, 369 U.S. 186, 198-204 (1962); *General Electric Co.* v. *Callahan*, 294 F.2d 60, 63, n. 3 (1st Cir. 1961); *Oil Workers Union* v. *Arkansas Louisiana Gas Co.*, 332 F.2d 64 (10th Cir. 1964); cf. *Bomar* v. *Keyes*, 162 F.2d 136, 139 (2d Cir. 1947) (L. Hand, J.), cert. denied, 332 U.S. 825 (1947).

Watson, 327 U.S., at 588-591, 593-595 (1946), shows, moreover, that the Supremacy Clause is not excluded from the "established practice [of] this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946).[14] "The District Court has no discretion to deny relief by preliminary injunction to a person who clearly establishes by undisputed evidence that he is being denied a constitutional right." *Henry* v. *Greenville Airport Comm'n.*, 284 F.2d 631, 633 (4th Cir. 1960).

Congress' "main concern" in establishing federal courts was to provide tribunals "subject to * * * nationalist influences" for effectuation of its policies *in the domain of interstate commerce;* only later was their domain extended to "individual rights." *McNeese* v. *Board of Education*, 373 U.S. 668, 672, 673

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[14] The "constitutional dimension" of Supremacy Clause questions (*Calbeck* v. *Travellers Insurance Co.*, 370 U.S. 114, 126 (1962)), is not destroyed by their legislative origin. *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 399 (1951); *Motor Coach Employees* v. *Missouri*, 374 U.S. 74, 82 (1963); *Kessler* v. *Dept. of Public Safety*, 369 U.S. 153, 156-157, 178, n. 13, 180 (1962). To hold otherwise reads the "Laws" phrase out of the Clause. *Testa* v. *Katt*, 330 U.S. 386 (1947).

(1963). To deny federal courts power to "guard against resistence to or evasion of [Congress'] authority [over interstate commerce], on the part of a State" (*Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958)) is to negate the very reason for their existence. In this area, above all, federal courts must "be alert to provide such remedies as are necessary to make effective the congressional purpose." *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964).

Since the state court's duty is imposed by federal law, its enforcement "in a federal court [need not] await an attempt to vindicate the same claim in a state court." *McNeese* v. *Board of Education*, 373 U.S. 668, 672-674 (1963). And because it is the pendency of the state proceeding which creates the forbidden conflict with federal authority and jeopardizes the free exercise of federal rights, relief in the federal courts cannot be required to abide the outcome of the state proceeding. *Construction Laborers* v. *Curry*, *supra*; cf. *Allegheny County* v. *Mashuda Company*, 360 U.S. 185, 187 (1959).

State courts enjoy no immunity from the Supremacy Clause. *Testa* v. *Katt*, 330 U.S. 386, 394 (1947). "No state can authorize one of its judges or courts to exercise judicial power * * * within the jurisdiction of another and independent government." *Abelman* v. *Booth*, 21 How. (62 U.S.) 506, 515-516, 524-526 (1859). "The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land." *Kalb* v. *Feurstein*, 308 U.S. 433, 439 (1940). "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by * * * common law rules." *Sola Electric Co.* v. *Jefferson Electric Co.*, 317

U.S. 173, 176 (1942), quoted in *Liner* v. *Jafco*, 375 U.S. 301, 308-309 (1964).

Therefore, when a state court improperly refuses to relinquish jurisdiction it becomes the duty of the federal court to step in. "When the exercise of state power * * * threaten[s] interference with the clearly indicated policy of industrial relations, it [is] judicially necessary to preclude the State from acting." *San Diego Unions* v. *Garmon*, 359 U.S. 236, 243 (1959). Certainly, "the federal court may enjoin the state proceeding in order to preserve the federal right." *Capital Service* v. *NLRB*, 347 U.S. 501, 504 (1954). Otherwise, "the judicial authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor." *Cohens* v. *Virginia*, 6 Wheat. (19 U.S.) 262, 419 (1821).

If the National Act as construed by this Court requires state court abstention, enforcement of the requirement by injunction is clearly authorized by the first two exceptions of § 2283. Authorization is implicit in *Interlake* itself. To deny authority to enjoin violations of the state court's duty would leave irreparable injury to Congress' policy "without a remedy"; it is impermissible to infer that Congress "intended so pointless and frustrating a result." *Parden* v. *Terminal R. Co.*, 377 U.S. 184, 190 (1964). Even *Richman* conceded (348 U.S. at 516) that "no prescribed formula is required; an authorization need not expressly refer to § 2283."

Authorization in Sections 10(j) and (l) of the Act of injunction suits by the Board is not material. Those provisions relate only to interlocutory injunctions against unfair labor practices. A preemption suit does not seek to enjoin an unfair labor practice, but instead to eliminate state encroachment upon the federal field

which may interfere with the federal mechanism for eliminating unfair labor practices or impair the exercise of rights Congress guaranteed against state infringement. *Hill* v. *Florida*, 325 U.S. 538, 545 (1945), Stone, C. J., concurring.[15]

Moreover, the second exception is clearly satisfied, for once the district court's jurisdiction to vindicate Congress' preemption policy is invoked under § 1331 or § 1337, injunctive relief may be granted "in aid of" that jurisdiction. *Donovan* v. *City of Dallas*, 377 U.S. 408, 412, n. 10 (1964). The Reviser's Notes on Section 2283 (H. Rep. No. 308, 80th Cong. 1st Sess., A 181-182), show that the second exception "was added to conform to section 1651 of this title * * *." 1 *Moore's Federal Practice* (2nd Ed., 1960), p. 2320. Section 2283, like its predecessor, Section 265, "does not deprive a district court of the jurisdiction otherwise conferred by the federal statutes * * *." *Woodmen of the World* v. *O'Neill*, 266 U.S. 292, 298 (1924).[16]

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[15] Since state infringement is not an unfair labor practice "(listed in Section 8)," (Act, Section 10(a)), it is not a subject of the Board's exclusive primary or discretionary jurisdiction.

Just as the same course of conduct may involve both an unfair labor practice and a breach of contract, so may it involve both an unfair labor practice and a violation of the Supremacy Clause. Cf. *Smith* v. *Evening News Assn.*, 371 U.S. 195, 197 (1962). While the General Counsel has exclusive discretionary jurisdiction to proceed against the former, he does not, and constitutionally could not, have discretion by inaction to bar relief against the latter. *Greene* v. *McElroy*, 360 U.S. 474, 507 (1959); *Order of Railway Conductors* v. *Swan*, 329 U.S. 520, 524-525 (1947). Cf. Petition for Writ of Certiorari in No. 388, this Term, *Amalgamated Association* v. *Dade County*, p. 29.

[16] Section 265 was held no bar in diversity cases to federal injunctions against state court suits designed for harrassment or to discourage lawful conduct. *American Optemetric Assn* v. *Ritholz*, 101 F.2d 883, 886-887 (7th Cir. 1939), cert. denied, 307 U.S. 647 (1939); *Jamerson* v. *Alliance Ins. Co.*, 87 F.2d 253, 256 (7th Cir. 1937).

Even if the "in aid of" authorization were not brought into play by the preemption suit, the pending Section 301 action was clearly sufficient to evoke it. See n. 12, p. 14, *supra*.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted and the judgment below reversed with instructions to grant the relief prayed for in the complaint.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 495—September Term, 1963

(Argued May 26, 1964 Decided June 23, 1964)

Docket No. 28904

INTERNATIONAL ASSOCIATION OF MACHINISTS, *et al.*,
Plaintiffs-Appellants,

v.

UNITED AIRCRAFT CORPORATION, *Defendant-Appellee.*

Before: LUMBARD, *Chief Judge*, WATERMAN and HAYS, *Circuit Judges.*

Appeal from an order of the District Court for the District of Connecticut, T. Emmet Clarie, *Judge*, denying a motion for a temporary injunction to prevent defendant's proceeding against plaintiffs in the state courts of Connecticut.

Affirmed.

MOZART G. RATNER, Washington, D. C. (Plato E. Papps, Washington, D. C., and William S. Zeman, Hartford, Connecticut, on the brief), for *Plaintiffs-Appellants.*

JOSEPH C. WELLS, Washington, D. C. (Frank E. Callahan, New Haven, Connecticut, on the brief), *for Defendant-Appellee.*

HAYS, *Circuit Judge:*

This is an appeal from an order denying plaintiffs' application for a temporary injunction restraining defendant from taking any step to prosecute two actions against plaintiffs which are now pending in the Superior Court, Hartford County, Connecticut. The temporary injunction was

sought in connection with an action for a declaratory judgment and a permanent injunction ordering defendants to withdraw their state actions.

The present controversy traces its origin to a strike conducted by the plaintiff unions against certain Connecticut plants of defendant during the period June 8, 1960 to August 11, 1960, and to a settlement agreement under which the strike was terminated. Differences have arisen over the interpretation of the strike settlement agreement and over its implementation. As a result the unions have filed unfair labor practice charges with the National Labor Relations Board and have brought actions against defendant in the District Court under Section 301 of the National Labor Relations Act (29 U. S. C. § 185) seeking damages for violation of the strike settlement agreement, and the defendant has brought two actions in the state courts of Connecticut demanding fifteen million dollars as damages allegedly suffered as the result of the strike action taken by the unions. It is these latter state court actions which the unions asked the District Court to restrain in the present action.

The burden of the unions' complaint is that the maintenance of the state court actions, which they claim were brought as a reprisal for the unions' filing unfair labor charges and actions under § 301, deprives the unions of rights granted them by Section 7 of the National Labor Relations Act. The unions, besides their actions to restrain defendant in the District Court, have filed additional unfair labor practice charges alleging that the defendant violated Section 8(a)(1) of the National Labor Relations Act by bringing the state court actions against the plaintiffs. The General Counsel has issued a complaint on these charges.

In the state court actions the unions entered pleas in abatement challenging the jurisdiction of the state courts to entertain the actions brought by the defendant. In effect the unions' pleas in abatement alleged: (1) that the bring-

ing of the state court actions was an unfair labor practice; (2) that the claims of defendant in the state court actions included claims of damages for activity which is protected by the National Labor Relations Act, and (3) that defendant's resort in its complaint in the state court actions to an allegation of conspiracy deprived the unions of rights under Section 7 of the Act and constituted an additional unfair labor practice.

The state court sustained demurrers to the unions' pleas in abatement. The unions thereupon filed the present action in the United States District Court, claiming that the state court was proceeding without jurisdiction, in violation of their rights, and requesting a declaratory judgment and an injunction ordering defendant to withdraw and dismiss its actions in the state courts. The unions moved for temporary and permanent injunctions. The District Court denied the application for a temporary injunction.[1] We affirm the decision of the District Court.

Plaintiffs contend that this case does not present the comparatively simple situation where a state court is called upon to determine whether certain activity is at least arguably an unfair labor practice,—the situation in which the state court, if it decides that the activity is arguably an unfair labor practice, must decline to accept jurisdiction because of the exclusive primary jurisdiction of the National Labor Relations Board to determine what are and what are not unfair labor practices. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 236 (1959).[2] It is true that whether the defendant committed an unfair labor practice in bringing the state court actions is about to be presented to the Board. The state court is not asked to pass

[1] Without mention of the application for a permanent injunction.

[2] At the same time the plaintiffs have not abandoned their contention, which was one of the grounds for their plea in abatement, that the defendant, in the state court actions, has claimed damages for protected as well as unprotected strike activity.

upon the question and makes no claim of any power to do so. To this extent the state court is not exercising any jurisdiction which properly belongs to the Board. If the Board should decide that defendant in bringing the state court actions committed an unfair labor practice, it might order the defendant to withdraw the actions. But see *Matter of Clyde Taylor*, 127 N. L. R. B. 103 (1960).

The plaintiffs, although they mention it in their Brief, do not appear to press the point that the state court is usurping what is arguably within the Board's jurisdiction. On the contrary they urge that the state court's action is a deprivation of Section 7 rights over which the Board has no jurisdiction at all. Their arguments run as follows: The Board has jurisdiction only over employer action which is an unfair labor practice under Section 8. But it is possible for employees and labor organizations to be deprived of their Section 7 rights by state action as well as by employer action. Where there has been a deprivation of Section 7 rights by state action, the federal courts must protect those rights since the Board has no power to do so. In the present case the action of the state court in entertaining defendant's damage suits is state action which deprives plaintiffs of certain of their rights under Section 7, in particular, the right to "free access to the Board and the federal courts for unfair labor practice charges and 301 suits without deterrence or reprisal." Section 7 rights are, by virtue of the Supremacy Clause, "constitutional rights." A state court has no jurisdiction to deprive a litigant of constitutional rights. Therefore, the federal court can enjoin the state court from entertaining the suits (or, equivalently, order the defendant to withdraw them).

There are a number of fallacies in the plaintiffs' argument. For example, though it does not appear to be completely necessary to the argument, there is no reason whatever to believe that a state court is without "jurisdiction" to decide the constitutional rights of the litigants before it. A more serious error is the assumption that because a

right is a federal right by reason of the Supremacy Clause it is a "constitutional right" in the bill of rights sense, i.e. that it is to be protected from invasion via state action by extraordinary remedies. If we call rights which are preemptive by reason of the Supremacy Clause, "constitutional rights," then all federal rights are "constitutional rights" and the phrase "constitutional rights" loses any real meaning. Still more basic to the argument is the contention that the federal courts have exclusive jurisdiction over those rights under Section 7 which are not within the Board's power to vindicate. There is no statutory or judicial authority which gives the federal courts jurisdiction over such rights. If the federal courts have "federal question" jurisdiction, a very doubtful proposition in the present case, see *Pan. Am. Petroleum Corp.* v. *Superior Court*, 366 U.S. 656, 661-66 (1961), there is no ground for holding that jurisdiction to be exclusive. Plaintiffs do not suggest any reason why a state court is not perfectly competent to pass upon the question of whether a litigant is being deprived by state action of his rights under Section 7 of the National Labor Relations Act, and actually this proposition has been tested time and again in cases coming to the United States Supreme Court in the regular course from state courts, with no suggestion that the state courts were without jurisdiction to pass upon it. See e g. *Hill* v. *Florida*, 325 U. S. 538 (1945); *La Crosse Tel. Corp.* v. *Wisconsin Employment Relations Bd.*, 336 U. S. 18 (1949); *International Union, U. A. W.* v. *O'Brien*, 339 U. S. 454 (1950); *Amalgamated Ass'n* v. *Wisconsin Employment Relations Bd.*, 340 U. S. 383 (1951); *Guss* v. *Utah Labor Relations Bd.*, 353 U. S. 1 (1957).

In *Local 24, Teamsters Union* v. *Oliver*, 358 U. S. 283 (1959), the state action involved was the action of the Ohio courts which, to use plaintiffs' language, deprived Local 24 of certain of its rights under Section 7 of the Act. The Supreme Court did not suggest that the state courts had no jurisdiction to entertain the case. For a case in which the

state court held that a state statute could not infringe Section 7 rights, see *Coos Bay Lumber Co. v. Local 7-116, Int'l Woodworkers*, 203 Or. 342, 279 P. 2d 508, on rehearing, 280 P. 2d 412 (1955).

In the case of *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U. S. 511 (1955) the union sought exactly what it seeks here, an injunction requiring the employer to withdraw his action in the state court. The Supreme Court said at page 518:

> "The assumption upon which the argument proceeds is that federal rights will not be adequately protected in the state courts, and the 'gap' complained of is impatience with the appellate process if state courts go wrong. But during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. With limited exceptions, it was not until 1875 that the lower federal courts were given general jurisdiction over federal questions. During that entire period, the vindication of federal rights depended upon the procedure which petitioner attacks as so grossly inadequate that it could not have been contemplated by Congress. The prohibition of § 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts.
>
> We cannot assume that this confidence has been misplaced."

Nothing has occurred since *Richman* which casts any doubt on what the Supreme Court there said. The Court has not suggested that there is any less reason today for having confidence in the state courts.

It is true, as plaintiffs urge, that the extent of the jurisdiction of the courts, both state and federal, over protected

activities and unfair labor practices has been more carefully defined than it was at the time of the decision of the *Richman* case. *Garmon, supra,* laid down the rule that where the subject activities are arguably within the Board's jurisdiction, the courts have no power to decide whether they are or are not protected activities or unfair labor practices. The difficulties which the court stressed in *Richman* no longer exist to the same degree.

But in the present controversy, plaintiffs have been at great pains to establish that this is not a *Garmon* type case, i.e. a case involving the question of the jurisdiction of the Board, but rather a case involving "state action" depriving them of Section 7 rights. Moreover even in a *Garmon* type case, the fact that the situations in which the state courts lack jurisdiction are somewhat clearer, because of the arguability rule, does not suggest the result for which the plaintiffs contend, to wit, that federal courts may enjoin state courts from deciding the issue of arguability.

In any event, even if we found that the auxiliary reasons given in *Richman* for refusing an injunction were no longer dispositive, we would still be faced with the statute, Section 2283.[3] There is nothing in the present case which would make that statute inapplicable. There is no express authorization by Act of Congress. There is no jurisdiction in the district court which would be aided by an injunction. The district court has issued no judgments which require protection or effectuation. We believe Section 2283 applies and prevents the issuance of an injunction.

Affirmed.

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[3] 28 U. S. C. § 2283 reads as follows:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

APPENDIX B

[Filed April 25, 1964]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. 10,324

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.,
Plaintiffs,

v.

UNITED AIRCRAFT CORPORATION, *Defendant.*

Memorandum of Decision on Plaintiffs' Application for Temporary Injunction

On December 12, 1961, the plaintiffs (hereinafter referred to as the Union) instituted actions in this Court alleging breach of a strike settlement agreement by the defendant (hereinafter referred to as the Company). Said actions are designated as Civil Actions No. 9084 and 9085. Pursuant to a ruling of this Court,[1] the Union has, since the early part of 1962, engaged in extensive discovery procedures, which are still in progress, and which are not due to terminate before June 15 of this year.[2]

On May 14, 1963, and thereafter, the Company commenced actions in the Superior Court for the State of Connecticut alleging tortious misconduct on the part of members of the Union during the strike. From then until March of this year, the Union attempted, under applicable state procedures, to abate the Company's suits on the ground, *inter alia*, that the state court lacked jurisdiction because the filing thereof constituted alleged unfair labor practices, vio-

[1] Ruling On Motion For More Definite Statement, Civil Actions Nos. 9084 and 9085, filed March 26, 1962.

[2] Ruling On Defendant's Motion To Compel Plaintiffs To End Discovery And To Comply With Court's Order Of March 26, 1962, Civil Actions Nos. 9084 and 9085, April 22, 1964.

lative of Sections 7 and 8 of the National Labor Relations Act. Such attempts to abate or dismiss were unsuccessful.

On March 2, 1964, the Union filed a complaint in this Court seeking a declaratory judgment and a mandatory injunction requiring the Company to withdraw its cases in the state court. The thrust of the complaint is that the maintaining of the state suits amounts to a deprivation of the Union's federally protected rights inasmuch as said suits constitute a reprisal for the Union's refusal to withdraw its charges against the Company of unfair labor practices, pending before the National Labor Relations Board.[3] Application was then made to this Court for a temporary and permanent injunction. A hearing was held on said application on March 10.

Three days later (March 13) and while the Court still had under advisement the Union's original application, the Union filed an amendment to the complaint and a supplemental motion for temporary and permanent injunction. The thrust of the amendment is that the state action is a retaliation for the Union's prosecuting of Civil Actions No. 9084 and No. 9085 in this Court and is an attempt to coerce the withdrawal of these cases. Oral argument on the supplemental motion was held on April 13.

The basic issue here is whether this Court has jurisdiction to grant the temporary injunctive relief prayed for by the Union. The Company bases its challenge to the jurisdiction on 28 U.S.C.A. § 2283, which provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[4]

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[3] *In the Matter of United Aircraft Corporation*, Case Nos. 1-CA-4201 and 1-CA-4202.

[4] It is clear that the command of § 2283 may not be avoided by addressing the injunction to a party, as in the present case, instead of to the state court. *E.g., Sperry Rand Corporation* v. *Rothlein*, 288 F. 2d 245, 247 (2d Cir. 1961).

This anti-injunction statute is a Congressional guide for avoiding friction between federal and state courts. It is the successor to similar enactments, originating with Section 5 of the Judiciary Act of 1793, and has been the subject of extensive judicial discussion.[5] It is sufficient here, therefore, to note only that the statute embodies the rules of comity and thus prohibits federal judicial intrusion into the orderly proceedings of the state courts. Guided by this statutory deference to state action, it is clear that in order to bar application of the section, a moving party must come within the purview of one of the enumerated exceptions. *Amalgamated Clothing Workers* v. *Richman Brothers Co.*, 348 U.S. 511 (1955); 1a MOORE, FEDERAL PRACTICE, Para. 0.208, at 2318 n. 22.

The Union cites no "express" authorization of Congress which would permit the granting of the relief requested. Section 10 of the Labor-Management Relations Act, 29 U.S.C.A. § 160 expressly authorizes a federal district court, in certain circumstances, to issue injunctive orders upon suit being brought by the National Labor Relations Board. No such action has been iniatiated by that administrative agency here.[6]

Nor is the prayed-for injunction "necessary in aid of (this Court's) jurisdiction." There is no material, concrete claim that the state suit impugns this Court's jurisdiction in Civil Actions No. 9084 and No. 9085. Counsel for the Union candidly admitted at the hearing on these motions that the proceedings in the state court would not frustrate or impede the expeditious prosecution of these actions to conclusion. The subject matter, underlying the action here and that before the Superior Court, is distinct, and from a practical standpoint, the proceedings in both forums do not conflict.

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[5] An exhaustive analysis of the original section and its progeny is found in Judge Wisdom's opinion in *T. Smith & Son, Inc.* v. *Williams*; 275 F. 2d 397, 402-407 (5th Cir. 1960).

[6] See *Infra* n. 8 and related text.

Nor can the Union here avail itself of the "in aid of its jurisdiction" exception by claiming that the state suits intrude on the exclusive power of the Board. Such claim can only be made by the Board, for only it has the requisite legal interest entitled to protection; and thus only it has a "standing" to maintain such a suit. *International Union of Electrical, Radio and Machine Workers* v. *Underwood Corporation*, 219 F. 2d 100, 102 (2d Cir. 1955). Although the General Counsel for the Board has filed unfair labor practices charges against the Company as a result of the state suit,[7] the Board itself has made no such finding, nor has the Board attempted to vindicate its authority through the processes of this Court. Therefore the Court finds that it lacks power to grant an injunction "in aid of its jurisdiction," because it has no jurisdiction that requires aid.

The final exception—that an injunction may be issued to protect or effectuate the judgments of the district courts—is not remotely applicable herein and does not warrant further comment.

In summary, giving full weight to the purposes and function of Section 2283 as an instrument in maintaining the balance between federal and state systems, the Court finds that under the circumstances in this case there is no basis for exception permitting an injunction. The application for a temporary injunction is denied. So ordered.

Dated at Hartford, Connecticut, this 24th day of April, 1964.

T. Emmet Clarie
United States District Judge

---

[7] See Transcript of April 13, 1964, p. 29.

[8] See Union's Exhibit #1B, attached to complaint.

APPENDIX C

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

Washington 25, D. C.

August 26, 1963

Re: United Aircraft Corporation
Case Nos. 1-CA-4201 and 1-CA-4202

Plato E. Papps, Esq.
Intl. Assoc. of Machinists, AFL-CIO
Machinists Building
Washington 6, D. C.

Mozart G. Ratner, Esq.
1411 K Street, N. W.
Washington, D. C.

William S. Zeman, Esq.
1 Grand Street
Hartford, Connecticut

Gentlemen:

Your appeal from the Regional Director's refusal to include in an 8 (a)(1) complaint allegations based upon the institution of a civil suit by the Company against the charging party and the inclusion of a conspiracy allegation in the complaint therein, has been duly considered.

This Office sustains your appeal. In *Clyde Taylor Co.*, 127 NLRB 103, the Board, while holding that an employer did not violate the Act by obtaining a state court injunction banning peaceful picketing in protest against unlawful discharges, held that the employer's threat to sue for libel for filing charges with the Board did not constitute an exercise of the "normal right of all persons to resort to the civil courts to obtain an adjudication of their claims," and that such a threat violated Section 8 (a)(1). If such a threat is violative of the Act, it follows that the effectuation of the threat by filing the civil action also constitutes unlawful restraint.

It was concluded that the civil action instituted by the Company here was directly related to and in effectuation of the Company's illegal threat to commence civil proceedings if the charging party did not withdraw the unfair labor practice charge filed against the Company; and that bringing the action, like the threat to do so, constituted a violation of Section 8 (a)(1). All further inquiries concerning this matter should be addressed to the Regional Director.

Very truly yours,

ARNOLD ORDMAN
General Counsel

By IRVING M. HERMAN
Irving M. Herman
Director, Office of Appeals

cc: Director, 1st Region

Intl. Association of Machinists, AFL-CIO, 96 Chestnut Hill Ave., Brighton 35, Massachusetts, Attn: Joseph Curran, Grand Lodge Representative

Lodge 743, Intl. Association of Machinists, AFL-CIO, Attn: John Sullivan, Business Representative, 1169 Main Street, East Hartford, Connecticut

United Aircraft Corporation, Attn: James Vandervoort, Personnel Manager, Hamilton Standard Division, Windsor Locks, Connecticut

United Aircraft Corporation, Attn: Martin F. Burke, Ind. Rel. Director, 400 Main Street, East Hartford, Connecticut

Joseph C. Wells, Esq., 1120 Tower Building, Washington, D. C.

Lodge 1746, Intl. Association of Machinists, AFL CIO, Attn: John Main, Representative, 357 Main Street, East Hartford, Connecticut

CERTIFIED MAIL

APPENDIX D

SUPERIOR COURT, HARTFORD COUNTY

No. 133885

UNITED AIRCRAFT CORPORATION

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.

November 12, 1963

Memorandum on Motion to Erase Defendants' Plea in Abatement

Plaintiff in this action seeks damages by reason of alleged acts of violence and misconduct engaged in by the defendant unions during a strike at plaintiff's plants in Windsor and Broad Brook from June 8, 1960 to August 11, 1960. The substituted complaint is in two counts. The second count alleges that the acts complained of in the first count were done as a result of a conspiracy.

The defendants have filed a plea in abatement on the ground that this court lacks jurisdiction because the filing of this action constitutes an unfair labor practice in violation of *Section 8 of the National Labor Relations Act, as amended*, 65 Stat. 601, 29 U.S.C.A. § 158, and because the relief prayed for is not limited to damages attributable only and directly from misconduct within the power of this State to illegalize.

Plaintiff has moved to erase defendants' plea in abatement on the ground that the issues raised by the plea in abatement are within the exclusive jurisdiction of the National Labor Relations Board.

Prior to November 1, 1963, the effective date of our new Practice Book, it was quite a general practice to move to erase from the docket where want of jurisdiction to hear and determine a case appeared on the face of the record.

Palmer v. *Reeves*, 120 Conn. 405, 411; *Felletter* v. *Thompson*, 133 Conn. 277, 279; *Village Creek Homeowners Assn.* v. *Public Utilities Commission*, 148 Conn. 336, 339. All of the above cited cases deal with the procedure of erasing a case, not a pleading, from the docket. Our new rules provide that, "Where want of jurisdiction appears on the record, the defect should be raised by a motion to erase from the docket. Thus where the nature of the action or the amount in demand shows that the court has no jurisdiction, or where the officer's return shows invalid service, and the like, a motion to erase shall be used." *Practice Book (1963) § 94.* Here, of course, the plaintiff makes no claim that this court does not have jurisdiction of the subject matter of its action, for that is the issue raised by the defendants' plea in abatement. The plaintiff, in effect takes the untenable position that the defendants may not attack the court's jurisdiction to hear this case under the federal pre-emption doctrine, while at the same time contending that the court is without jurisdiction to explore its alleged lack of jurisdiction under the same federal pre-emption doctrine.

It is significant that the defendants have filed a plea in abatement. A plea in abatement requires a responsive pleading by answer or demurrer. *Practice Book (1963) § 95.* An issue of law or fact should be joined on the plea in abatement in order that the court may deliberately upon proper pleading determine whether under the federal pre-emptive doctrine the claim of unfair labor practice is "reasonably arguable" and applicable in this case. See *Marine Engineers* v. *Interlake Co.*, 370 U.S. 173, 182; 82 S. Ct. 1232, 1242; *Lavery's Main St. Grill Inc.* v. *Hotel Employees Union*, 146 Conn. 93, 100 & 103.

The motion to erase is denied.

BARBER, J.

APPENDIX E

SUPERIOR COURT, HARTFORD COUNTY

No. 133885

UNITED AIRCRAFT CORPORATION

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.
(Lodge 743)

January 8, 1964

Memorandum of Decision on Demurrer of Plaintiff to Plea in Abatement of Defendants

The matter before the court presently is the demurrer of plaintiff to the plea in abatement of defendants to the substitute complaint of plaintiffs. In the substitute complaint, plaintiff pleads in two counts. In the first it seeks damages for claimed injuries sustained by it by alleged violence and misconduct of defendants engaged in during a strike at plaintiff's plants at Windsor Locks and Broad Brook, Connecticut in 1960. In the second count, it pleads that the allegedly offending acts mentioned in the previous count were engaged in by the defendants as a result of a conspiracy.

Defendants' plea in abatement is based upon three grounds. The first is that the filing of the substitute complaint (hereinafter referred to as the complaint) constitutes an unfair labor practice under § 8 of the National Labor Relations Act, as amended, 65 Stat. 601, 29 U.S.C.A. § 158. The gist of the second ground is that the scope of the allegations of the complaint comprehend not only a claim for damages for claimed illegal activity of defendants, but also for injuries necessarily resulting from concerted action of defendants which is protected by the Act and as such preempted from state jurisdiction. The third ground is that the invocation of the "conspiracy doctrine" in the second

count of the complaint constitutes an additional unfair labor practice.

By attached exhibits the plea in abatement shows that on or about May 29, 1963, charges were made to the Regional Director of the N.L.R.B. in behalf of one or more of defendants alleging against plaintiff, in addition to charges already previously made, the bringing of the instant action for damages to be an unfair labor practice within the meaning of said § 8(a)(1) and (3) (5) of said Act.

The demurrer of plaintiff to the plea in abatement is upon several grounds, as therein is more fully set forth.

From a fair reading of the allegations of the complaint, the facts concerning which damages are claimed relate to claimed acts of violence, mass picketing and other tortious conduct of defendants in relation to strike activities of a type and nature as to which the power of the state and state courts to grant relief by way of damages has not been pre-empted by the National Labor Relations Act. *United Construction Workers* v. *Laburnum Corp.*, (1954) 347 U.S. 656; *United Auto Workers* v. *Russell*, (1958) 356 U.S. 634; *Lavery's Main Street Grill, Inc.* v. *Hotel Employees Union*, (1959) 146 Conn. 93. As matter of law, the mere fact that the illegal conduct is also an unfair labor practice does not defeat the state jurisdiction. *United Construction Workers* v. *Laburnum*, supra, 660-661; *United Auto Workers* v. *Russell*, supra, 637; *Lavery's Main Street Grill, Inc.* v. *Hotel Employees Union*, supra, 101-102.

In *Clyde Taylor Company*, 127 N.L.R. Board 103 (April 11, 1960) Taylor obtained an injunction in a state court banning peaceful picketing resorted to by the Union in protest against the discharge of employees, including a union steward. The state court had no jurisdiction to issue the injunction. Recognizing the right of all persons in good faith to protect their property and to litigate their claims in court, so long as the motivation was not a desire to defeat union organization of employees, a legitimate purpose of

the Act, the National Labor Relations Board ordered dismissed the complaint which charged a violation of § 8(a)(1) of the Act for having obtained in a state court an injunction banning the picketing. Three members of the Board were of the opinion there had been no violation of said Section 8(a)(1) of the Act because of the good faith of Taylor in litigating his own rights; one member was of the opinion that there had been an unfair labor practice in obtaining the state injunction but that since it was not in bad faith and the motive was not to defeat union organization the complaint should be dismissed. It would appear from this Board ruling that the mere filing of the complaint in the present action for damages would not be considered as in violation of the Act.

Also since a demurrer does not admit conclusions, it does not admit that the filing of the complaint here is an unfair labor practice. *Smith* v. *Furness*, 117 Conn. 97, 99.

In defendants' memorandum of December 6, 1963, they request the court to take judicial notice of the claimed fact that the General Counsel of the N.L.R. Board has issued a complaint charging that plaintiff has committed an unfair labor practice by filing this damage suit. Granting that judicial notice may take the place of proof in proper circumstances, the court may not entertain such proof at the present time for the more fundamental reason that the demurrer must be tested against the allegations to which it is directed including such proof as is properly admissible under them consistent with the rules of evidence. *Tomes* v. *Thompson*, 112 Conn. 190, 198; *Cashman* v. *Meriden Hospital*, 117 Conn. 585, 586; *O'Donnell* v. *Sargent & Company*, 69 Conn. 476.

If the proposition is granted that if such a complaint in behalf of the National Labor Relations Board has been issued, such assertion of jurisdiction by the Board would be sufficient to establish an "arguable" case in favor of initial Board jurisdiction (cf. *Marine Engineers* v. *Interlake Com-*

pany, 370 U.S. 173, 182, note 16 (1962), it would be of no avail for there is no allegation of such fact in the plea in abatement to make it admissible. If it be assumed that such action of the N.L.R.B. General Counsel did not occur until after the filing of defendants' plea, it does not alter the situation as to its inadmissibility under present circumstances; its use must await further procedural avenues or remedies to make its interdictory effect felt.

It is difficult to understand why the fact that the scope of the averments of the complaint of plaintiff may be broad enough to include activities of defendants coming under the protection of the N.L.R.B. does or should operate automatically to pre-empt the power of the state court to adjudicate an action otherwise properly within its jurisdiction. The objection of defendants would seem more properly to present a question of the sufficiency of the stated cause of action, a matter not now before this court under the plea in abatement, and to present a problem of the admissibility of evidence on trial under appropriately framed issues.

Moreover, to concede the pre-emptive jurisdictional proposition of defendants, either because of the mere filing of plaintiff's complaint for damages, or because of the filing by defendants with the N.L.R. Board of charges against plaintiffs of committing an unfair labor practice in bringing the action, could lead to strange and unjust results. It would be tantamount to allowing defendants, permanently or temporarily for an uncertain length of time, even beyond the limitations period perhaps, as has been stated, an immunity from liability for their tortious action gained at the expense of cutting off, or unduly delaying an injured party from his right to recover damages for his property, without recourse or compensation, to an extent which the United States Supreme Court has so far refused to decree, and which no declaration of congressional policy yet supports. *United Construction Workers* v. *Laburnum*, supra, 664; *United Auto Workers* v. *Russell*, supra, 646.

The third ground of abatement, connected with the second count is that the invocation of the "conspiracy doctrine" constitutes an additional unfair labor practice. This claim is predicated on the fact that the allegations of the complaint in this respect also cover injuries to plaintiff necessarily resulting from activities protected under the Act. The averments of the complaint clearly direct the conspiracy claim to the claimed violence, mass picketing and other stated illegal conduct of defendants. There is no more reason for divesting the state court of jurisdiction which it has because of this dual aspect than there is in regard to the filing of the complaint.

The demurrer of plaintiff is sustained as to all grounds of the defendants' plea in abatement, viz., as to the first and third grounds of abatement, for the reason that said plea fails to show that the filing of the complaint for damages in the instant case is an unfair labor practice, and even assuming it were such, that fact alone would not operate to pre-empt state court jurisdiction in the instant matter; and as to the second ground of abatement for the reason that, so far as the plea in abatement shows, this court does have jurisdiction of the cause stated in the complaint which seeks damages attributable only to the unlawful conduct of defendants.

An order may enter accordingly.

PASTORE, J.

APPENDIX F

SUPERIOR COURT, HARTFORD COUNTY

No. 133885

UNITED AIRCRAFT CORPORATION

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS; AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 91, INTERNATIONAL ASSOCIATION OF MACHINISTS; AND LOCAL 743, INTERNATIONAL ASSOCIATION OF MACHINISTS

No. 133884

UNITED AIRCRAFT CORPORATION

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS; AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 91, INTERNATIONAL ASSOCIATION OF MACHINISTS; INDUSTRIAL AIRCRAFT LODGE 1746 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS

February 21, 1964

Memorandum of Decision on Plaintiff's Demurrer to Defendants' Amended Plea in Abatement to Substituted Complaint

These are companion cases in which the pleadings are identical in substance and except insofar as some factual allegations may differ in respects in no way affecting the question of law raised by the pleadings presently under consideration. Accordingly, but one Memorandum of Decision is being prepared to be filed in both cases.

The plaintiff's substituted complaint is in two counts. In brief, the first count alleges that the defendant unions engaged in a strike at the plaintiff's plants during which the unions and their members engaged in illegal and unlawful actions which constituted an unlawful interference

with the plaintiff's business and caused the plaintiff to incur expense for damage to property and to protect its lawful interests. The second count alleges that the alleged illegal acts specified in the first count were done in conspiracy with another union and others.

To this substituted complaint the defendants pleaded in abatement that the court lacked jurisdiction over the subject matter contained in the substituted complaint. The plaintiff filed a motion to erase the plea in abatement for want of jurisdiction over the subject matter of the plea and this motion was denied. Thereupon the plaintiff demurred to the defendants' plea in abatement on nine grounds and this demurrer to the plea in abatement was sustained on all grounds in a lengthy, well reasoned opinion by Pastore, J.

Subsequently the defendants filed an "Amended Plea in Abatement to Substituted Complaint" and to this pleading the plaintiff has demurred. The sufficiency of that demurrer is the present matter for determination by the court.

The amended plea in abatement to the substituted complaint, it is noted, is verbatim the same as the original plea in abatement to the substituted complaint except that whereas the original plea in abatement to the substituted complaint attempted to incorporate by reference an earlier plea in abatement filed June 3, 1963 by defendants to the original complaint together with exhibits attached thereto, the present amended plea in abatement to the substituted complaint not only recites that it incorporates by reference the entire June 3, 1963 original plea in abatement to the original complaint together with the exhibits thereto attached, but further and in addition incorporates by reference into the present plea as defendants' Exhibit 1 a copy of a "Motion for Leave to Withdraw Motion to Consolidate Cases and to further Amend Complaint dated August 13, 1963, and to File Substitute Motion together with Ap-

pendix attached thereto" dated August 30, 1963 and filed by Counsel for the General Counsel, National Labor Relations Board, First Region in Cases No. 1-CA-3355 et al before The National Labor Relations Board, First Region, (which latter motion, incidentally, expressly incorporates by reference all the allegations of the original complaint which it seeks to amend and supplement but which has not been filed or made an exhibit in these proceedings).

In other words, the amended plea in abatement to the substituted complaint which is the subject of the present demurrer purports to incorporate by reference within its allegations not only (a) an earlier superseded plea in abatement with the exhibits attached thereto, but (b) a motion to amend a complaint filed in a proceeding before the National Labor Relations Board which, in turn, (c) incorporates by reference all the allegations of the original complaint in that proceeding—which original complaint is neither attached nor filed nor made an exhibit.

The result is, obviously, confusion worse confounded! It is difficult to find any part of the defendants' pleading which follows the most elemental rules of Connecticut Practice and Procedure. In fact, even to file the present amended plea in abatement without the consent of the plaintiff or after a motion for leave to file it had been filed and granted by this court was improper pleading. Practice Book, Sec. 132. See Mitchell v. Smith, 74 Conn. 125; Brockett v. Fair Haven & W. R. Co. et al, 73 Conn. 428; Hazel Cole's Appeal from Probate, 18 Conn. Sup. 167, 168.

"Rules of pleading are not made for the purpose of tripping up the unknowing or unwary. They are designed to clarify and fix the issues and to confine the judicial inquiry necessary to decide the issues within reasonable and relevant limits. . . ." Salem Park, Inc. v. Salem, 149 Conn. 141, 144. "Pleadings have their place in our system of jurisprudence. While they are not held to the strict and artificial standard that once prevailed, we still cling to the

belief, even in these iconoclastic days, that no orderly administration of justice is possible without them." Malone v. Steinberg, 138 Conn. 718, 721. "Pleadings should be direct, precise and specific. . . The court should not have to mathematically dissect the pleadings in order to understand them. The forms of pleadings and the rules governing their use are to be found in the Practice Book. Since 1879 it has served its purpose, occasional changes being adopted as the need is demonstrated . . . Innovations should not be put into practice ex parte by counsel." Vigue v. John Hancock Mutual Life Ins. Co., 147 Conn. 305, 306.

Even without its attempted incorporation by reference of undisclosed matter incorporated by reference, the present plea in abatement to the substituted complaint utterly and completely fails to comply with the basic and first requirement of pleading in this jurisdiction. This is set out in Sec. 70 of the Practice Book and Sec. 52-98 of the General Statutes:

> "Each pleading shall contain a plain and concise statement of the material facts on which the pleader relies, but not of the evidence by which they are to be proved, such statement to be divided into paragraphs numbered consecutively, each containing as nearly as may be a separate allegation."

The defendants' present amended plea in abatement to the substituted complaint is anything but "a plain and concise statement of the material facts on which the pleader relies." It improperly attempts to incorporate within it evidence by which the material facts are sought to be proved. It is not "divided into paragraphs numbered consecutively, each containing as nearly as may be a separate allegation." In fact, it does not appear that there has even been an attempt by the defendants to comply with Sec. 70 of the Practice Book and Sec. 52-98 of the General Statutes.

Nor is the court powerless to compel compliance with the basic rules for proper pleading when there is such a gross disregard for them. Section 52-119 of the General Statutes expressly provides "Parties failing to plead according to the rules and orders of the court may be nonsuited or defaulted, as the case may be."

However, rather than attack the gross deficiencies of the defendants' plea, the plaintiff has demurred to it, thus presenting the question as to whether this amended plea in abatement has cured the insufficiencies of the prior plea as to which this court by Pastore, J. sustained plaintiff's demurrer. "Under these circumstances the court, in the interest of economy of judicial procedure, although rather against its better judgment, has decided to take the case as presented by the parties." Swainbank v. Coombs, 19 Conn. Sup. 391, 394.

As already noted, the only change in the present amended plea in abatement from the prior plea as to which the plaintiff's demurrer was sustained is in the additional language in the first and second paragraphs of the amended plea which incorporates into the plea as defendants' Exhibit 1 a document entitled "Motion for Leave to Withdraw Motion to Consolidate Cases and to Further Amend Complaint, dated August 13, 1963, and to File Substitute Motion together with Appendix A attached thereto." So the narrow issue now before the court is whether this added allegation cures the defects for which this court has already sustained a demurrer.

Before a consideration of the merits of this issue are discussed two matters should be noted:

a) the defendants did not comply with the requirements of Sec. 91, paragraph 2 of the Practice Book with respect to serving and filing the Exhibit 1 referred to in the amended plea in abatement which, instead of being served and filed, was marked as an Exhibit for Identification.

b) Exhibit 1 referred to in the plea (marked as Exhibit 1 for identification at the hearing) is not a complete document in that it is entitled "Motion for Leave to Withdraw Motion to Consolidate Cases and to Further Amend Complaint, dated August 13, 1963, and to File Substitute Motion together with Appendix A attached thereto." Attached to this motion in the exhibit is a form entitled "First Amended Charge Against Employer" dated June 10, 1963 which states that "The charging party re-alleges and incorporates herein by reference all allegations of the original charge (initially filed as Fourteenth Amended Charge)." There is also attached a form entitled "Charge Against Employer" dated June 6, 1963 which states that "The charging party hereby realleges and incorporates herein by reference all allegations of the Thirteenth Amended Charge filed April 15, 1963."

Nowhere on the exhibit does it appear, nor has it been alleged or shown, whether or not the "Motion for Leave to Withdraw Motion to Consolidate Cases and to Further Amend Complaint dated August 13, 1963" was granted or denied, nor does it anywhere appear nor has it been alleged or shown whether or not the "Motion to File Substitute Motion Together with Appendix A attached thereto" has been granted or denied. Nor has this court been in any way apprised of what was purportedly "re-alleged" and incorporated by reference in the "Charges against Employer" stated in Exhibit 1.

This court can hardly be expected to evaluate the effect of a document, the contents of which are not disclosed, or of a copy of motions filed in another matter when it has no knowledge whether the motions were granted or denied!

In addition, it does not appear that the pleading of the Exhibit 1 cures the defects in the amended plea in abatement as noted by this court in sustaining the demurrer to the original plea in abatement. The defendants' failure adequately to plead over after the sustaining of the demurrer leaves this court with no other course than to render

judgment for the plaintiff on the present demurrer which is on the same grounds as that previously sustained. Leger v. Kelley, 142 Conn. 585, 587; Cashman v. Meriden Hospital, 117 Conn. 585, 589.

The only possible relevancy of the only added allegation with regard to Exhibit 1 referred to in the present plea is with respect to the allegation that plaintiff's action in filing the complaint in this action was an unfair labor practice. That same allegation was made in the original plea in abatement and this court by Pastore, J. sustained the demurrer addressed to it. The concluding language of his Memorandum of Decision dated January 8, 1964 is clear and precise:

> "The demurrer of plaintiff is sustained as to all grounds of the defendants' plea in abatement, viz., as to the first and third grounds of abatement, for the reason that said plea fails to show that the filing of the complaint for damages in the instant case is an unfair labor practice, and even assuming it were such, that fact alone would not operate to pre-empt state court jurisdiction in the instant matter; and as to the second ground of abatement for the reason that, so far as the plea in abatement shows, this court does have jurisdiction of the cause stated in the complaint which seeks damages attributable only to the unlawful conduct of the defendants."

There is no need to quote further from Judge Pastore's Memorandum of Decision or re-cite the authorities therein cited. It must be held that the defendants' amended plea in abatement does not cure the insufficiencies for which the demurrer to the original plea in abatement was sustained. Accordingly, for the reasons hereinbefore noted and those set forth in the January 8, 1964 Memorandum of Decision of Judge Pastore, the demurrer to the amended plea in abatement to the substituted complaint is sustained.

HOUSE, J.

APPENDIX G

ARTICLE VI, CLAUSE 2, CONSTITUTION OF THE UNITED STATES

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

28 U.S.C.A. § 1331

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

28 U.S.C.A. § 1337

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

28 U.S.C.A. § 1343

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States * * *."

28 U.S.C.A. § 1651

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or

appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C.A. § 2283

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

THE LABOR MANAGEMENT RELATIONS ACT, 1947, 29 U.S.C.A. § 141, *et seq.*

Section 157. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

* * *

Section 158. (a) It shall be an unfair labor practice for an employer - -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

* * *

Section 160. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * *

Section 163. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

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SUPREME COURT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 533

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.,
Petitioners

v.

UNITED AIRCRAFT CORPORATION, *Respondent*

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 533

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.,
Petitioners

v.

UNITED AIRCRAFT CORPORATION, *Respondent*

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

In framing their Questions Presented without reference to the existence of 28 U.S.C. § 2283, petitioners would ignore the controlling issue in this case. In our view the sole Question Presented is the following:

Whether the Court below was correct in holding that it was precluded by Section 2283 of Title 28 of the United States Code from issuing an injunction, upon the application of various labor unions, to restrain an employer from pursuing an action for damages against said unions in a state court.

STATEMENT OF THE CASE

Petitioners seek review of an affirmance by the Court of Appeals for the Second Circuit of an order by the district court denying an application by various labor unions for a temporary injunction to restrain respondent from proceeding to prosecute two damage actions against petitioners in the Superior Court, Hartford County, Connecticut. The courts below held that such relief was barred by 28 U.S.C. § 2283.

a. Preface

We see no authorization in Rule 21 of this Court, which provides for the filing of "a transcript of record in the case", for the submission of records or portions of records of cases other than the one at bar. Petitioners, however, have seen fit to lodge with the Clerk and to refer in their petition, as part of their statement of the case, to an appendix and brief in a wholly different civil action, No. 28595, in the Court of Appeals for the Second Circuit (Pet. 3, n. 1).[1] Their statement of the case is accordingly cluttered with alleged facts arising from proceedings before the National Labor Relations Board (hereafter referred to as the "Board") and courts which, in our opinion, are irrelevant to the narrow issue before this Court.

Our concern is that the rather detailed statement of the case by petitioners might imply that the asserted facts have been brought to the attention of either the state court or the district court in this action, and that these forums have passed upon their probative

[1] In this Opposition, "Pet." refers to the Petition for a Writ of Certiorari, "Pet. App." refers to the Appendix attached thereto, and "R." refers to the Record certified by the Clerk of the Court below.

value. Thus, at the outset, it should be noted that no testimony has been taken in either forum. The record before each court consists entirely of pleadings, and with respect to the district court, several affidavits supplied by petitioners.

A succinct restatement of the relevant facts of this case, without embellishment, would appear to be in order.

b. Background

This controversy has its roots in a strike undertaken by the petitioners against respondent during the period from June 8, 1960 to August 11, 1960 (R. 169, Pet. App. 2a). Respondent filed suit in the state court alleging that petitioners were engaging in tortious and illegal strike conduct and prayed for injunctive relief (R. 64). On June 13, 1960 the petitioners entered into stipulations, with the approval of the state court, agreeing to desist from mass picketing and from interfering with access to respondent's plants by means of force, violence or intimidation, and to limit the number of pickets at the plant entrances (R. 64-65). On or about June 14, 1960, a regional director of the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended (hereafter referred to as the "Act"),[2] applied to the United States District Court for the District of Connecticut for an injunction to restrain conduct by the petitioners alleged to be in violation of Section 8(b)(1)(A) of the Act, and on June 16, 1960, the petitioners executed a stipulation by which they agreed to refrain from such acts thereafter (R. 65).

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[2] 61 Stat. 136, 29 U.S.C. § 141 *et seq.*

The strike came to an end on August 11, 1960 (R. 169, Pet. App. 2a), and the respondent and two of petitioners[3] executed strike settlement agreements with respondent which established procedures by which strikers would be eligible for recall to work (R. 119, 169; Pet. App. 2a, 8a). On and after November 21, 1960, Lodges 1746 and 743 filed charges with the NLRB alleging that respondent had illegally refused to reinstate strikers, and on December 12, 1961, filed suits in the United States District Court for the District of Connecticut alleging that the respondent had breached its strike settlement agreements (R. 119, 169; Pet. App. 2a, 8a).

c. The Lawsuits in Controversy

On May 13, 1963, respondent filed in Superior Court of Hartford County, Connecticut, the two actions that petitioners are seeking to have enjoined (R. 2-3, 112). These were suits against petitioners for damages caused by their alleged violence, mass picketing, coercion, intimidation and other misconduct during the strike in 1960 (R. 27-28, 33-34; Pet. App. 16a-17a). On June 4, 1963, respondent filed substituted complaints, adding to the initial complaints the allegation that petitioners had conspired to commit the tortious and illegal acts complained of (R. 27, 33; Pet. App. 16a).

Within a month after the docketing of respondent's suits in the state court, petitioners contested the court's jurisdiction by filing pleas in abatement to the complaint (R. 8-10, 11-12). There they contended that the filing of the suits by respondent constituted an un-

[3] Lodge 1746 and Lodge 743, International Association of Machinists, AFL-CIO.

fair labor practice[4] and that the inclusion of a conspiracy count also constituted an unfair labor practice. They also claimed that the damages sought were not limited to losses attributable solely to tortious misconduct of the petitioners, but encroached upon protected activities as well. On these grounds petitioners urged that federal law had preempted the state court from asserting its jurisdiction.

On November 20, 1963, respondent filed demurrers to petitioners' pleas, taking issue with each of the contentions therein (R. 21-23, 24-26). On January 8, 1964, a memorandum of decision in each case was issued by Judge Pastore of the Superior Court, in which he analyzed the preemption contentions and sustained all grounds of the demurrers (R. 27-32, 33-37; Pet. App. 16a-20a). He noted that the contentions of petitioners that "the scope of the averments of the complaint of plaintiff may be broad enough to include activities of defendants coming under the protection of the NLRB" would present "a question of the sufficiency of the stated cause of action, a matter not now before this court under the plea in abatement, and to present a problem of the admissibility of evidence on trial under appropriately framed issues" (R. 30, 36; Pet. App. 19a) and that the complaint sought damages only for the unlawful conduct of petitioners (R. 32, 37; Pet. App. 20a). Amended pleas in abatement were thereafter filed by petitioners (R. 38-39, 40-41)

[4] At that time the petitioners had filed charges with the NLRB alleging that the filing of the lawsuits constituted an unfair labor practice but the General Counsel had not yet issued a complaint. On August 26, 1963, the General Counsel reversed the Regional Director's refusal to issue a complaint in the matter (R. 7-8). A complaint was issued four days later alleging that the institution of the suits violated Section 8(a)(1) of the Act (R. 3).

and demurred to by respondent (R. 42-44, 45-47). On February 21, 1964, a memorandum of decision was issued by a different judge of the Superior Court, Judge House, who sustained the demurrers (R. 48-55; Pet. App. 21a-27a).

Shortly after the issuance of Judge House's decision, petitioners, on March 2, 1964, filed their complaint in the federal district court, alleging (R. 1a) that

> "The action complained of is assertion by the State of Connecticut of jurisdiction over defendant's suits for damages which are alleged by the General Counsel of the National Labor Relations Board to constitute unfair labor practices prohibited by Section 8 of the Act"

and praying for "a judgment declaring that the State of Connecticut has no legal right to entertain defendant's aforesaid suits and a mandatory injunction compelling defendant to withdraw and dismiss them." (R. 6). They filed at the same time a motion for a temporary injunction to restrain respondent from "taking any steps to prosecute its damage suits" *pendente lite,* and a permanent injunction ordering respondent "to withdraw and dismiss the aforesaid suits" (R. 56). On March 11, 1964, petitioners amended their complaint to allege in a second count that an object of the state court suits was to retaliate against petitioners for filing breach of contract actions in the district court and to coerce withdrawal of such actions (R. 61-62). At the same time a supplemental motion was filed by petitioners for a temporary and permanent injunction (R. 63). An answer to the complaint was duly filed by respondent, contesting various allegations of the complaint and denying that the dis-

trict court had jurisdiction to issue an injunction (R. 112-114).

The district court, on April 24, 1964, denied the application for injunction, holding that it had no jurisdiction in the light of 28 U.S.C. § 2283 (R. 119-123). Petitioners then applied to the court of appeals for an injunction pending appeal (R. 125), but their motion was denied (R. 166). Thereafter, following receipt of briefs and the presentation of oral argument, the court of appeals affirmed the order of the district court (R. 168-175; Pet. App. 1a-7a). The crux of its holding was "Section 2283 applies and prevents the issuance of an injunction." (R. 175; Pet. App. 7a).

ARGUMENT

Petitioners studiously avoid any reference to Rule 19 of this Court in their attempt to justify the issuance of a writ of certiorari. The absence of any such express reference is significant, for an analysis of the matter reveals that no grounds for the issuance of a writ exist.

This Court in *Amalgamated Clothing Workers* v. *Richman Brothers*, 348 U.S. 511 (1955), in a situation identical to the case at bar for all relevant purposes, ruled explicitly that the relief that petitioners now seek was precluded by statute. There a labor union requested a federal district court to issue an injunction to restrain a state court from proceeding with a suit by an employer against it, on the theory that federal law had preempted the subject matter in controversy and the state court was without jurisdiction. This Court, in agreement with both the district court and court of appeals, held that federal courts were

prohibited by the statutory provisions of 28 U.S.C. § 2283 from granting injunctive relief.[5]

Petitioners have not attempted to draw any factual distinction between the case at bar and *Richman*. They have not suggested that there is any conflict among the courts of appeals, or that the court below has decided the case in a manner which conflicts with the holding in *Richman*. Nor do they assert that this Court has not yet resolved the applicability of Section 2283 to their situation. Their only ground for the petition lies in their quarrel with the *Richman* decision itself,[6] and, within a decade of its issuance, they would have this Court overrule it.

1. The Decision Below Is Plainly Correct

The decisions of the district court and court of appeals below were predicated squarely upon this Court's decision in *Richman*. As the court of appeals correctly observed (R. 174; Pet. App. 6a):

> "Nothing has occurred since Richman which casts any doubt on what the Supreme Court there said. The Court has not suggested that there is any less reason today for having confidence in the state courts."

On the authority of the then recently decided case of *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, (1955), this Court in *Richman* started with the assumption

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[5] Section 2283 provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

[6] The third question presented in the petition (p. 2) is "Whether Amalgamated Clothing Workers v. Richman Bros. Co., 348 U.S. 511 (1955), has been undermined and should be reconsidered."

that the conduct in controversy was subject to the Taft-Hartley Act and therefore outside state authority. With that premise in mind, the Court held that a federal district court can not, at the request of a private party, enjoin the attempt to secure relief in the state proceedings. Section 2283 of Title 28 of the United States Code bars the way.

Petitioners, on the basis of their reading of this Court's decisions in *Guss, Garmon,* and *Interlake,*[1] would have this Court concede that it erred in *Richman.* These cases, petitioners tell us, have undermined *Richman* by circumscribing the situations in which state courts may assert their jurisdiction by making it clear "that if encroachment is 'arguable', then the state court must relinquish jurisdiction." (Pet. 12). In view of the Court's assumption in *Richman* that the conduct in question was subject to the Taft-Hartley Act, it is difficult to see how other cases also holding that the conduct in controversy was subject to the Taft-Hartley Act, throw either light or shadow on *Richman.*

But petitioners have fundamentally misconceived the nature of the Court's decision in these cases. It was plainly expressed in *Interlake,* 370 U.S. at 177:

> "It is the petitioner's contention that the issue to be determined in this case is not whether the state courts correctly decided their 'labor organization' status, but whether the state courts were free to finally decide that issue at all. *The petitioners contend that the principles of the Garmon decision confined the state court to deciding only whether the evidence in this case was sufficient to*

[1] *Guss* v. *Utah Labor Relations Board,* 353 U.S. 1 (1957); *San Diego Unions* v. *Garmon,* 359 U.S. 236 (1959); *Marine Engineers Association* v. *Interlake Co.,* 370 U.S. 173 (1962).

> *show that either of them was arguably a 'labor organization' within the contemplation of § 8(b). We agree,* and hold that the *evidence* was sufficient to deprive the Minnesota courts of jurisdiction over this controversy." (Emphasis supplied).

The holding of *Interlake* is unequivocal. State courts are not, as petitioners would have it, shorn of their traditional power to hear evidence in their effort to determine the presence or absence of jurisdiction. Obviously the factual questions inherent in a preemption matter can only be decided when all the evidence is adduced.

Far from discrediting *Richman,* these cases support the proposition established in that decision that the troublesome problems of federal preemption can best be dealt with after full hearing by the state courts themselves, subject to ultimate review by this Court. Each of the three cases relied upon by petitioners reached this Court after a definitive ruling by the highest tribunal of the state, *Guss* on appeal from the judgment of the Utah Supreme Court, *Garmon* on writ of certiorari to the California Supreme Court, and *Interlake* upon writ of certiorari to the Minnesota Supreme Court. Indeed, all but a handful of the 29 decisions of this Court in the labor-management field cited by petitioners reached this court by writ of certiorari to or appeal from the appellate courts of the state.[8] Only *Capital Service* v. *N.L.R.B.,* 347 U.S. 501

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[8] The exceptions were cases which, unlike the case at bar, had their origin in the federal district court, rather than the state court, *e.g., Local 20, Teamsters* v. *Morton,* 377 U.S. 252 (1964) (action for damages under § 303 of Taft-Hartley Act); *St. John* v. *Wisconsin Employment Relations Board,* 340 U.S. 411 (1951); and *American Federation of Labor* v. *Watson,* 327 U.S. 582 (1946) (statutory three judge court convened to pass upon validity of state statute).

(1954) and *Richman* dealt with attempts by a federal court to enjoin state court proceedings within the framework of 28 U.S.C. § 2283.

Petitioners cite *In re Green*, 369 U.S. 689 (1962), and *Local 438, Construction and Laborers Union* v. *Curry*, 371 U.S. 542, (1963), in support of their assertion that "state court proceedings which encroach upon the preempted field are no longer, as in *Richman's* day, 'allowed to run [their] course.' " (Pet. 13). To the contrary, each did run its course to the highest tribunal of the state, reaching this Court by writs of certiorari issued to the supreme courts of Ohio and Georgia. In any event, the vice in the state court contempt citation reversed by this Court in *In re Green*, was the deprivation of due process in that court's failure to afford the party cited for contempt with any hearing whatsoever as to whether its jurisdiction was preempted by federal law. *In re Green*, like *Interlake*, champions the necessity for developing a complete record in the state court.[9]

Petitioners likewise would interpret the Court's decision in *Curry* far too broadly. The *Curry* case merely presented the question of whether a temporary injunction approved by the state supreme court constituted a final judgment for purposes of review by this Court. This Court held that it was, pointing out that the issue of jurisdiction had been finally decided by the highest court of the state, that that court had

[9] There is no intimation in this Court's *In re Green* decision that had the state court held a hearing, its contempt citation would have been reversed. This Court pointed out, 369 U.S. at 692, that it was impossible to determine from the truncated record of the case whether the dispute was subject to the jurisdiction of the NLRB.

passed upon the merits of the case as well, and that there was nothing more of substance to be resolved by the trial court.

The case at bar demonstrates the wisdom of the policy of federal self-restraint enunciated in *Richman*. Notwithstanding the *melange* of representations gleaned from other cases and made by petitioners to this Court in their statement of the case,[10] the record in the state court is barren of evidence. No testimony whatsoever has been adduced there. A complaint has been entered, and motions addressed to the court's jurisdiction have been made and opposed. No answer has yet been filed. Petitioners have concentrated on vigorously attacking the court's jurisdiction, and the lower court on two separate occasions, after receipt of briefs and hearing of argument, has for the time being rejected their jurisdictional assertions. The court, in adherence to the precepts of *Interlake* and *In re Green*, has properly refused to rule summarily on matters which it believes can more feasibly be developed at trial "under appropriately framed issues" (R. 30, 36; Pet. App. 19a). The state supreme court has not yet been given an opportunity to pass on the jurisdictional question.

Dissatisfied with the result so far in the state court, petitioners would try another forum. And so the pre-

[10] We refer to the assorted documents and pleadings filed in various civil actions and NLRB cases (Pet. 3, n. 1), as well as affidavits which remain untested by cross-examination (R. 64-99, 100-111). Indeed, by comparing the record of this case in the courts below with the petitioners' statement of the case here, it is apparent that the petitioners have proposed far more representations of fact to this Court than they saw fit to present to the district court.

diction of this Court in *Richman*, 348 U.S. at 519, is borne out:

> "A district court's assertion of equity power or its denial may in turn give rise to appellate review on this collateral issue. There may also be added an element of federal-state jurisdiction which may be trusted to be exploited and to complicate, not simplify, existing difficulties."

Petitioners would merely substitute one court for another as the forum in which to try their case. If the district court were to have jurisdiction to enjoin the state court, petitioners and respondent would presumably elicit there the same testimony and advance the same arguments concerning preemption that otherwise would be presented to the state tribunals.

There is no reason to assume now, any more than when *Richman* was decided, that state courts are not competent to pass upon the impact of alleged federal preemption upon their jurisdiction. Petitioners are merely taking the first step of a *non-sequitur* when they assert (Pet. 12) that "a possibility of conflict between federal and state regulation establishes arguability; state power is superseded until all possibility of conflict is removed." For, as the court below correctly observed (R. 174; Pet. App. 7a): "The fact that the situations in which the state courts lack jurisdiction are somewhat clearer, because of the arguability rule, does not suggest the result for which plaintiffs contend, to wit, that federal courts may enjoin state courts from deciding the issue of arguability." Indeed, petitioners have couched their contentions to the superior court in terms of "argu-

ability" (R. 9, 11, 30, 36; Pet. App. 18a-19a). Presumably any jurisdictional issues to be addressed by petitioners to the state supreme court will be drawn in similar fashion. Apart from indicating their displeasure with the decisions of the state court, petitioners have not sought to explain, either to this Court or the court below why the state courts are unfit to decide that issue (R. 172; Pet. App. 5a).

2. No Issue of Importance Is Raised By Petitioners

No issue of conceivable importance is raised in the petition, either in terms of impact upon the petitioners or upon the administration of the Act generally. As for petitioners, the worst that can befall them is that they must continue to defend their strike misconduct in the state courts. If a judgment for damages is awarded against them, they can pursue their preemption contentions on appeal to the supreme court of the state and by petition for writ of certiorari before this Court. The potential injury to them in fact is far less than that to which the petitioner in *Richman* was exposed, for there this Court's affirmance of the lower court left standing an injunction issued by the state court.

Here the possibility that the district court would restrain the state court if it had jurisdiction to do so is remote indeed, for nothing which even borders on irreparable injury has been shown. All that is called into question in the state court is the issue of damages for alleged tortious conduct attending a strike in 1960. Aside from the inconvenience of defending their conduct in court, petitioners point to nothing more substantial than the fancied invasion of a legal right which

can, if their contentions are well founded, be fully remedied on appeal.[11]

With respect to the general administration of the Act, protection against any serious conflict between state courts and the Board is amply afforded by this Court's holding in *Capital Service* v. *NLRB*, 347 U.S. 501 (1954). If the NLRB should view any such asserted conflict as warranting immediate remedial action, upon issuance of a complaint it may apply to the federal district court pursuant to Sections 10(j) or 10(l) of the Act for an injunction, and the district court in its discretion may enjoin the state court from proceeding.

In the context of this case, where the petitioners' complaint is predicated on an asserted conflict arising from the issuance of a complaint by the General Counsel (R. 1a, 3, 5), it is anomolous to suggest that the rights of a complainant are not adequately safeguarded by the General Counsel. His failure to invoke the jurisdiction of the district court by application for injunction can only mean that he does not subscribe to petitioners' notion that the continuation of the state court suits would "jeopardize and perhaps altogether defeat the federal mechanism for elimination of unfair labor practices" (Pet. 14). That deci-

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[11] Nor will their Section 301 actions pending in the district court suffer. Somewhat as an afterthought petitioners amended their complaint to allege that respondent's resort to the state court infringed their rights in the 301 suits. Then, before concluding their petition to this Court, they added a final paragraph (Pet. 22) injecting jurisdiction through the 301 actions. The district court was unimpressed, pointing out that in fact petitioners have not been deterred in prosecuting those suits, and that the state court and 301 actions do not conflict (R. 121-122; Pet. App. 10a).

sion on a matter of public policy is, we think, entitled to controlling weight.

CONCLUSION

For the aforementioned reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 533

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.,
Petitioners

v.

UNITED AIRCRAFT CORPORATION, *Respondent*

REPLY OF PETITIONERS TO BRIEF IN OPPOSITION

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1. On October 1, 1964, the court below decided Docket No. 28,595 (Pet. 3, n. 1), holding offensive to national labor policy respondent's attempt to extinguish strikers' statutory protection against unfair labor practices under the guise of collective bargaining. *Local 743, Machinists* v. *United Aircraft Corp.*, 57 LRRM 2245. Extinction by retaliatory state court litigation is no less offensive.

2. Respondent assumes (Opp. 13-14), that under *Guss, Garmon* and *Interlake* state courts have the same unfettered discretion to deal with questions of argu-

ability that they had under *Richman* to adjudicate questions of federal prohibition or protection. That assumption is not only groundless, it is necessarily false. Applied to this case it would mean that § 2283 immunizes defiance of this Court's mandate to consider a complaint of the General Counsel decisive of arguability on the pretext that a state court "can hardly be expected to evaluate the effect of" a complaint it chooses to ignore (Pet. 9). Cf. *Kalb* v. *Feuerstein*, 308 U.S. 433, 439 (1940).

Unless "the Judges in every State" are *not* "bound" by this Court's construction of "the Constitution and Laws of the United States," this petition for certiorari and the relief prayed for therein should be granted.

Respectfully submitted,

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